Supreme Court, U.S.
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No. 99-7

IN THE

Supreme Court of the United States

RAYMOND A. HAIK; MARK C. HAIK,

Petitioners,

v.

TOWN OF ALTA, a political subdivision of the State of Utah; SALT LAKE CITY CORPORATION, a policital subdivision of the State of Utah,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TOWN OF ALTA, A POLITICAL SUBDIVISION OF THE STATE OF UTAH

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QUESTIONS PRESENTED

1. Whether Alta violated the Haiks' right to equal protection by refusing to extend its water lines to their lots when Alta's contract with Salt Lake City forbids such extensions absent Salt Lake City's consent?

2. Whether Alta's conduct in refusing to issue building permits to the Haiks constituted a taking without compensation when the Haiks did not have the requisite water supply required by State and local law?

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STATEMENT OF THE CASE

The district court set forth a comprehensive and highly instructive statement of facts in support of its opinion granting the Town of Alta's (hereinafter "Town" or "Alta") Motion for Summary Judgment. *Petitioners' Brief, App. B, at 19a-26a.* The factual findings most pertinent to the issues before this Court, as quoted from the district court, are as follows:

Albion Basin is located above the Alta and Snowbird ski resorts at the top of Little Cottonwood Canyon, east of Salt Lake City, and comprises part of the watershed relied upon by Salt Lake City and other Salt Lake Valley communities for their culinary water supply.

The Little Cottonwood Water Company promised the availability of not more than 50 gallons per day to users in each of not more than 35 cabins to be constructed in the Albion Basin Subdivision #1.

On August 12, 1976, Salt Lake City entered in to the INTERGOVERNMENTAL AGREEMENT — WATER SUPPLY AGREEMENT SALT LAKE CITY TO ALTA CITY ("Water Supply Agreement"). . . . The Water Supply Agreement provides that Salt Lake City "agrees to make available to Alta for its use, as hereinafter described, the normal flow of raw, untreated water, not to exceed 265,000 gallons per day." [citing ¶ 1 of Water Supply Agreement]. Alta's "use, as hereinafter described," included the following express limitation:

> 8. It is expressly understood and agreed that said pipelines shall not be extended to or supply

> water to any properties or facilities not within the present [1976] city limits of Alta without the prior written consent of [Salt Lake] City.

[citing ¶ 8 of Water Supply Agreement]. It is uncontroverted that in 1976, Albion Basin Subdivision #1 lay beyond the [present] city limits of Alta. Moreover, the Water Supply Agreement recited that "Alta recognizes [Salt Lake] City's need to protect its watershed and specifically agrees to be bound by and comply with all City water ordinances, applicable County ordinances, Salt Lake City-County Board of Health regulations and applicable state law." [citing ¶ 12 Water Supply Agreement]. It also appears uncontroverted that in 1976, "applicable County ordinances" limited construction in the Albion Basin Subdivision #1 to one single family cabin per subdivision lot, which the Board of Health required to be supplied with 400 gallons of water per day as a precondition to issuing a building permit.

In 1981, Alta undertook to annex the Albion Basin Subdivision, which was accomplished by an August 20, 1981 resolution following a July 16, 1981 public hearing. Thereafter, Alta conditioned issuance of building permits in the Albion Basin upon "approval of all uses, regardless of the size or number of units" given "in writing by the Salt Lake City-County Health Department, who shall certify as to the adequacy of the culinary water system and the sewage system." The approval of culinary water and sewer systems "shall be in accordance with the regulations of the Salt Lake City-County Health Department and the Utah Division of Health." TOWN OF ALTA UNIFORM ZONING ORDINANCE, § 22-7-8(2) (1989). The regulations referred to by the Alta ordinance continue to require the availability of 400 gallons of water per housing unit. *See* UTAH ADMIN. CODE § R309-105-1(1.2.6) (1997).

In 1983, Alta requested an amendment to the Water Supply Agreement, authorizing an extension of water service to the newly annexed Albion Basin properties. Salt Lake City, however, declined to consent to the proposed amendment. In 1988, however, Salt Lake City adopted a Watershed Management Plan and consented to Alta's use of water for snowmaking within Alta's city limits, which by 1988 included land within the Albion Basin area.

In April 1991, the Salt Lake City Council adopted a Watershed Ordinance, § 17.04.020.A, B(1) of the Salt Lake City Ordinances, which, *inter alia*, prohibits the city from entering into any new water sales agreements or expanding any existing agreements, with three exceptions:

> (a) water sales for residential use to property owners with a spring on the property;
>
> (b) water sales to governmental entities for us on land they own or lease; or
>
> (c) water sales for snowmaking and fire protection in certain cases.

In 1992, pursuant to the 1991 ordinance, Salt Lake City agreed to supply water to the United States Forest Service for recreational purposes at several locations, including the Albion Basin campground. In 1993, Salt Lake City gave consent to use of additional water for snowmaking by the Alta Ski Lifts Company. In 1995, Salt Lake City also consented to the extension of Alta's municipal water lines to an expanded Alpenglow lodge facility, which purportedly falls within the 1976 city limits of Alta and therefore within the terms of the 1976 Water Supply Agreement.

A month later, in October 1994, the Haiks stepped into this milieu by purchasing Lots 25, 26, 29 and 30 of the Albion Basin Subdivision #1 from Marvin Melville.

In a November 29, 1994 response to Raymond Haik's written inquiry concerning water and sewer services, Alta informed Haik that Alta does not provide water and sewer services to the Albion Basin Subdivision and referred him to the Salt Lake City Department of Public Utilities, Water Division. Upon inquiry by the Haiks, Salt Lake City in 1996 declined to consent to the extension of Alta water pipes and water supply to the Haiks' lots, relying on Paragraph 8 of the 1976 Water Supply Agreement and the 1991 Watershed Ordinance, § 17.04.020 of the Salt Lake City Ordinances.

In October, 1997, three years after their purchase, the Haiks continue to own Lots 25, 26, 29 and 30 of Albion Basin Subdivision #1, and continued to be unable to build on those lots because of the lack of culinary water supply that remains a legal prerequisite to the construction of dwellings on the property.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED. PETITIONERS HAVE SHOWN NO COMPELLING REASON WHY THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE DECISIONS OF THE DISTRICT COURT AND THE TENTH CIRCUIT COURT OF APPEALS.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. As will be shown in the following points and authorities, the Tenth Circuit's opinion sustaining the district court's conclusion that Petitioners' equal protection and takings claims should be dismissed is mandated by recent decisions of this Court, and is supported by decisions rendered by the circuit courts of appeal and the Utah Supreme Court.

With respect to Petitioners' equal protection claim that Alta's 1976 Town boundary was irrationally established as the limit for the extension of the Town's water lines, this Court and the circuits have all held that the interest in water for real estate development is not a fundamental right. Neither is there any conflict in state or federal case law that the resultant rational basis test is a "paradigm of judicial restraint," mandating a strong presumption that the statutory classification is valid and holding that the challenged classification must be sustained if any reasonably conceivable state of facts would provide a rational basis for it. Applying this deferential standard of review, the district

court and the Tenth Circuit found the 1976 boundary line to be rationally related to a legitimate governmental interest.

Petitioners' takings claim is premised on the assertion that they have lost all economically viable use of their Albion Basin lots because Alta refused to grant them building permits until they could demonstrate a legal right to culinary water in the amount of 400 gallons per day. The water supply regulations at issue have been in effect in the Albion Basin since 1971. Petitioners purchased their Albion Basin lots in 1994. On these facts, the Tenth Circuit held that Petitioners cannot maintain a taking claim because they did not have a protectable interest in property; that is, the Petitioners were not entitled to a building permit because they did not meet the health department's 400 gallon per day culinary water requirement. In short, Alta could not have "taken" a right or interest Petitioners did not possess. In reaching this decision, the Tenth Circuit relied on decisions by the Utah Supreme Court which mandated such a result under Article I § 22 of the Utah Constitution.

Significantly, the Utah law upon which the Tenth Circuit relied is in close harmony with this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1002 (1992). As this Court pointed out in *Lucas*, "where a regulation deprives land of all economically beneficial use, the state may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1028. In the instant case, the Petitioners did not have a right to obtain a building permit to begin with because they lacked the requisite water rights. As shown below, other circuits have reached similar results in applying the *Lucas* pre-existing limitations rational.

As explained above, there is no compelling reason why this Court should grant certiorari. Nevertheless, Alta is compelled to set the record straight as to the application and interpretation of relevant law. Thus, in sections II through V below Alta demonstrates the absolute correctness of the decisions challenged by Petitioners.

II.

THE DISTRICT AND CIRCUIT COURTS CORRECTLY DETERMINED THAT ALTA DID NOT VIOLATE THE HAIKS' RIGHT TO EQUAL PROTECTION.

The courts below both recognized that the interest in water for real estate development is not a fundamental right. There appears to be no conflict on this point among the circuits. *See Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990); *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 567 (7th Cir. 1991); *Ransom v. Marrazzo*, 848 F.2d 398, 413 (3rd Cir. 1988); *Chatham v. Jackson*, 613 F.2d 73, 80 (5th Cir. 1980). Thus, the state action in question in this case needs only some rational relation to a legitimate state interest.

A. Limits of judicial review under the Rational Basis Test.

This Court defined the limits of equal protection challenges under the rational relation test in *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307 (1993). The Court articulated a highly deferential standard of judicial review:

> Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices . . . [under the rational basis test,

> governmental action] must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis for the classification.* Where there are "plausible reasons" for Congress' action, "our inquiry is at an end."

Id. at 313 (quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 169 (1980)) (emphasis added). The Court characterized this as "a paradigm of judicial restraint." *Id.* A statutory classification is afforded a "strong presumption of validity" and parties challenging the classification "have the burden 'to negative every conceivable basis which might support it.' " *Beach*, 508 U.S. at 315. (*quoting Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Moreover, the Court stated that "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.*

B. Alta's conduct was rationally related to legitimate governmental objectives.

As applied to the facts of this case, the rational basis test warrants a finding that Alta's refusal to extend its waterlines beyond its 1976 boundaries or to issue building permits is rationally related to two very plausible objectives. First, as the Tenth Circuit observed:

> There are plausible reasons for Alta's refusal to extend its waterlines to Haiks' property. Alta has a legitimate state interest in not breaching its 1976 Water Supply Agreement. Alta does not have an independent right to water; it merely purchases

> water from Salt Lake City. Thus, while Alta may have the physical capacity to supply water to the Haiks' lots, it does not have the legal right to do so and to compel Alta to breach its contract would be unreasonable.

(*Petitioners' Brief, App. A*, at 9a).

Second, Alta's refusal to issue building permits to the Haiks is rationally related to the Haiks' inability to satisfy state and local culinary water supply regulations. Those regulations require a minimum culinary water supply of 400 gallons per day. *See* UTAH ADMIN. CODE § R309-105-1(1.2.6) (1997). This same standard of 400 gallons per day has been adopted by the Salt Lake City-County Health Department which, since 1971, has consistently refused to approve building permits unless that standard is met. *Respondent Alta's Brief, App. A*. Alta has adopted the same standard, by incorporation, in its zoning ordinance.

C. The Haiks' claims of "pretextual conduct" by Alta are without merit.

Petitioners argue that the Town's conduct is arbitrary and capricious under the rational relation test, because Alta's reliance on the prohibitions of the 1976 Water Supply Agreement is pretextual; i.e., the Town's true motivation was to prevent development within the watershed. *Petitioners' Brief* at 27-29.[1] Claims of pretext, however, are

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1. In an apparent attempt to breathe life into their argument that Alta and Salt Lake City engaged in collusive acts to prevent Petitioners from making any economic use of their property, Petitioners allege that "Alta never requested Salt Lake City's consent (Cont'd)

irrelevant unless there is no other conceivable rational basis for the Town's conduct. As previously noted, there are at least two very plausible bases for Alta's conduct, either of which clearly passes muster under the rational basis test.

(Cont'd)

to extension of water to Petitioners' lots." *Petitioners' Brief* at 4. This statement is patently untrue. In its statement of relevant facts, the district court concluded: "In 1983, Alta requested an amendment to the Water Supply Agreement, authorizing an extension of water service to the newly annexed Albion Basin properties. Salt Lake City, however, declined to consent to the proposed amendment." *Petitioners' Brief, App. B*, at 23a. Again, in 1988, Alta requested clarification concerning Salt Lake City's policy regarding the sale of water in the Albion Basin. On March 11, 1988, Salt Lake City responded and informed Alta that the City would not approve of the sale of water by Alta in Albion Basin because of the detrimental effect that further development would have on the water quality. *Respondent Alta's Brief, App. B*, at 5a, ¶ 10 and attachments.

Petitioners also argue that "[d]uring the same period Alta was refusing to consent to extend its water lines to allow residential development in the annexed area, Alta sought, and Salt Lake granted, consent to use Alta's water for snowmaking, both inside and outside Alta's 1976 Town line." *Petitioners' Brief* at 4. Petitioners assertions are out of context and therefore misleading. For example, in 1988 Salt Lake City adopted a Watershed Management Plan that allowed for the use of snowmaking, a non-consumptive use, within the Albion Basin. *Petitioners' Brief, App. B*, at 23a. Furthermore, in 1992, pursuant to its 1991 Watershed Ordinance, Salt Lake City also consented to the use of additional water for snowmaking by the Alta Ski Lifts Company. *Petitioners' Brief, App. B*, at 24a. The only non-snowmaking use, to which Salt Lake City consented was an extension of Alta's municipal water lines to an expanded Alpenglow Lodge facility. The Alpenglow Lodge, however, was situated within the Town's 1976 city limits and was therefore within the terms of the 1976 Water Supply Agreement. *Petitioners' Brief, App. B*, at 24a-25a.

In support of their pretext argument the Haiks cite the Ninth Circuit's opinion in *Lockary v. Kayfetz*, 917 F.2d 1150, 1155-56 (9th Cir. 1990) (remanding for trial because plaintiffs presented facts tending to show that no water shortage existed where, if true, no rational basis would exist for moratorium on water hookups). *Petitioners' Brief* at 16. The instant case bears no similarity to the facts that motivated the remand in *Lockary*. It cannot fairly be contended that Alta's conduct was not genuinely motivated by a legitimate governmental interest. It is undisputed that under the 1976 Agreement Salt Lake City retained the right to forbid any extension of the Alta water system beyond its 1976 limits. Moreover, there is no evidence in the record that Alta has ever disputed the enforceability of the water supply contract. Indeed, the record demonstrates that Alta deemed the contract to be enforceable when it sought Salt Lake City's consent to extend its waterlines in 1983 (consent was refused), and sought clarification regarding the contract's prohibition on extensions in 1988 (refusal to consent to extension was reaffirmed).

Allegations of pretext are irrelevant unless the Haiks can negative every conceivable basis for Alta's conduct and demonstrate that all asserted reasons for such conduct are without factual support. There is no deceit or hidden agenda at issue in this case. The prohibitions contained in the 1976 Water Supply contract and the requirements of state and local water supply regulations constitute hard, verifiable facts.

III.

THE DISTRICT AND CIRCUIT COURTS CORRECTLY HELD THAT THE TOWN HAS NO DUTY TO PROVIDE WATER SERVICE TO ALL TOWN RESIDENTS.

A. Alta does not have an unconditional duty to supply water to the Haiks under applicable Utah case law.

The district and circuit courts both rely on a series of Utah Supreme Court cases which have consistently held that municipal corporations do not have a legal duty to provide water service to all members of the public provided these governmental entities act reasonably in evaluating individual conditions and circumstances.

In *Rose v. Plymoth Town*, 173 P.2d 285 (Utah 1946), the Utah Supreme Court held that mandamus did not lie to compel town authorities to extend their municipal water system to plaintiff's residence located within the town's geographical limits where such extension could be accomplished only at considerable expense. *Id.* at 287. The key to *Rose* is the Court's statement that "[*u*]*nless the town authorities are shown to have failed to exercise judgment or discretion such that a refusal to extend the water system would be unreasonable, their decision is final.*" *Id.* (Emphasis added).

In *Child v. City of Spanish Fork*, 538 P.2d 184 (Utah 1975), the Utah Supreme Court rejected a claim that a municipality's requirement that landowners in a newly annexed area convey shares of water in exchange for annexation was arbitrary, unreasonable, and a denial of equal

protection. The court agreed with the trial court's observation that such a condition "represented prudence in planning for the city's needs" and upheld the conditional annexation as being wholly within the city's powers and not "in any degree unreasonable or arbitrary, ..." 538 P.2d at 186-87. Rejecting the new annexees' claim of unequal treatment as compared to existing residents who made no conveyance of water rights, the court observed that "different treatment of individuals does not necessarily violate the equal protection of the laws assurances." *Id.* at 187. Persons may be treated differently by the law "if the classifications have a reasonable relationship to a proper and lawful purpose, and if all persons within the same class are treated equally." *Id.*

In *Thompson v. Salt Lake City*, 724 P.2d 958 (Utah 1986), Salt Lake City conditioned water service upon agreement by the landowner to be responsible for payment for all water provided to his property. The plaintiff/lessees sued to obtain water service where the landowner/lessor refused to sign such an agreement, asserting that the city had a duty to provide water service and that the condition requiring landowner agreement was "arbitrary, unreasonable, and discriminatory," and denied equal protection of the laws. The Court denied the relief requested, *holding that although municipalities are authorized to provide water service, they are not public utilities and do not "have a legal duty to provide water service to all members of the public. . . ."* 724 P.2d at 959 (emphasis added). *See also Platt v. Town of Torrey*, 949 P.2d 325, 329 (Utah 1997) (a municipality need only act "reasonably" with respect to the provision of municipal services to its residents.); *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 253 (Utah App. 1998). ("If the ordinance and the state policies and reasons underlying it do, within

reason, debatably promote the legitimate goals of increased public health, safety, or general welfare, we must allow . . . legislative judgment to control.")

Thus, *Rose, Child, Thompson* and *Platt* stand for the proposition that municipalities have broad discretion in deciding when and where to provide municipal services and, so long as they are required to exercise judgment or discretion with respect to the supply of such services, their decision is final and not subject to judicial review. The Tenth Circuit put this issue in clear perspective:

> In short, Alta and Salt Lake City proffer they had to draw the line somewhere, and chose to do so in the 1976 Agreement at Alta's 1976 Town boundaries. They do not claim to be seeking to stop all developments in the canyon, or even all development in Alta for that matter. Rather, their purported objective is to curtail further environmentally harmful development outside Alta's 1976 Town boundaries. Line-drawing "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the lines. [That] the line may have been drawn differently at some points is 'not a matter for judicial consideration.' " *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 317-16 (1993) (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

Petitioners' Brief, App. A, at 11a–12a. *See also Lyng v. International Union*, 458 U.S. 360, 370 (1988) (Under the deferential standard of review, drawing lines that create

distinctions is peculiarly a legislative task and an unavoidable one.); *Matthews v. Diaz*, 426 U.S. 67, 83 (1976) (Congressional line drawing necessarily implies that people with differing circumstances will be placed on either side of the line; courts cannot second-guess where to place that line).

Petitioners argue that "the political line that divides the Alpenglow day lodge from Petitioners' property, Alta's 1976 Town boundary, is entirely unrelated to the hydrology or geography of the watershed. The decision to allow significant development on one side of that arbitrary line but none on the other side violates the Petitioners' right to equal protection." *Petitioners' Brief* at 15. Petitioners erroneously assume that a distinct line exists where sensitive watershed areas in the Albion Basin begin and end. More importantly, Salt Lake City had to draw a line somewhere that would define the limits beyond which Alta's water lines could not be extended. That line was drawn at Alta's 1976 town limits — an entirely rational choice given the perceived need to immediately preserve as much of the watershed as possible.

B. Alta has no absolute duty to supply water to the Haiks under Utah's annexation statute or under the Town's 1981 Policy Declaration.

There is no indication in Utah's annexation statute that Alta has an unqualified legal duty to provide water and sewer service to all residents. "Areas annexed to municipalities in accordance with appropriate standards *should* receive the services provided by the annexing municipality, subject to 10-2-424, as soon as possible, following an annexation. . . ." UTAH CODE ANN. § 10-2-401(4) (emphasis added). Section 401(4) does not mandate that annexed areas "*shall*" receive "*all* services" provided by the annexing municipality. Rather,

the Utah legislature was careful only to state that the annexed areas "should" receive "the services" provided by the annexing municipality to ensure that annexation is responsive to the exercise of legislative discretion and local needs. *Respondent Alta's Brief, App. C*, at 10a.

Consistent with the annexation statute, Alta's 1981 Policy Declaration is noticeably silent as to the provision of water services as part of the Albion Basin annexation. Paragraphs 5 and 6 of that Declaration provide:

> 5. *Need for municipal services*. The Town of Alta presently owns, operates and maintains a sanitary disposal system in the form of a dumping station connected to the Town sewer system. In addition, the Town provides police and fire protection to its residents, and avalanche warning and protection system and planning and zoning services. All such services are absolutely essential for any urban development within the area proposed, given the location of the area involved and the fact that the same lies within the watershed of Salt Lake City. All such services would be available to the area proposed for annexation. The Town recognizes that certain portions of the area anticipate obtaining such services from Salt Lake County. However, such would result in an unnecessary duplication of services and an inefficient use of resources, which would severely impair the programs now in operation. The Town declares that it can provide the necessary services in the most beneficial, economic and efficient manner to the subject properties and that providing the service by alternate means is not within the public and environmental interest.

> 6. *Timetable.* All of the municipal services described above shall be available to the territory set forth in Exhibit "A" immediately upon annexation. Increased police patrols and fire prevention efforts will occur following annexation finalization. Sewer services, as described above, shall be provided as such area is developed. The existing sewer facilities are, or can be made, adequate to provide services to the annexed territory.
>
> The subject area has been serviced by the Town of Alta for several years by fire and police protection, avalanche warning, 911 emergency communications, library, and sewage disposal through the town dump station.

Petitioners' Brief, App. E, ¶¶ 5-6.[2]

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2. Petitioners' Appendix E omits above quoted paragraph 5 "*Need for municipal services*" and therefore incorrectly numbers above quoted paragraph 6 "*Timetable*" as paragraph 5. Petitioners assert that upon purchasing their lots in 1984, they requested "Alta, at Petitioners' expense, to allow Petitioners to connect to Alta's municipal water and sewer services *as provided in the annexation proceedings*, so they could obtain a building permit to build a residence." *Petitioners' Brief* at 3 (emphasis added). This is a misstatement of the results and intent of the Albion Basin Policy Declaration. As is readily noted from the above-quoted text, the Policy Declaration conferred no rights upon any land owners within the Albion Basin to connect to Alta's municipal water service.

C. The terms of the 1981 Policy Declaration were not amended to include assurances that water would be provided to the Albion Basin.

The Haiks argue that certain statements were made by Alta's mayor in the course of the annexation hearings suggesting that Alta intended to include water as one of the services ~~to~~ be provided to the Albion Basin. But such a contention is obviously without merit when the Minutes of the July 16, 1981 hearing are examined. Petitioners relied on these same Minutes in their principal memorandum filed in support of their motion for summary judgment. Among other matters, the Minutes disclose (1) that *the Town council "has no intention of changing any existing agreements with outside agencies*" — a statement which in context obviously refers to the 1976 Water Supply Agreement with Salt Lake City; (2) that Mr. Cahill asked "that [the council] review the sewer and water connection fees and that David [Nicponski] noted that the *basin people will not realize either one as they will not be able to hook up onto either system because of the location of this area*"; and (3) "that Bill Hoge, property owner, has no objection to this proposal but asks the council if they would be interested in augmenting their water supply for the Town with a water reservoir in the basin. The mayor stated that the Town will do everything possible to regularize the water supply in the basin and we will do this in cooperation with Salt Lake City Water Department. *We will do and will try to work something out with the Water Department, as they actually have full control over the water in the canyon.* We could talk in terms of a control reservoir and try our best to work with everyone concerned."

Respondent Alta's Brief, App. D, at 14a-16a (emphasis added).

The only reasonable interpretation of these minutes is that Salt Lake City held all the cards in the Albion Basin and that, in 1981, no water hookups could be anticipated.

On these facts, and construing all permissible inferences in favor of the Petitioners, the district court held:

> Alta's 1981 Policy Declaration may itself have some binding force, but informal statements by the Mayor in the context of the annexation discussions do not operate as an amendment to that document adding water service to the services listed in paragraph 5. "The policy declaration, including maps, may be amended from time to time *by the governing body after at least 20 days notice of public hearing*." UTAH CODE ANN. § 10-2-414 (1996) (emphasis added). Nothing in the statute confers upon the Mayor the power to amend. Nor may the Mayor's promise be read into the annexation ordinance as a matter of "statutory construction."

Petitioners' Brief, App. B, at 38a. The Haiks did not challenge this holding in their appeal to the Tenth Circuit and are, therefore, precluded from raising it in their instant petition. Neither did they assert in their appeal to the Tenth Circuit the doctrine of promissory estoppel upon which they implicitly relied.[3] Accordingly, they are also precluded from raising that issue now.

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3. The district court noted: "The Haiks would now enforce these statements against Alta, apparently as a matter of promissory estoppel." However, . . . "Utah recognizes the general rule precluding a party from asserting estoppel against the government. *Utah State University v. Sutro & Co.*, 646 P.2d 715, 718 (Utah 1982)." *Petitioners' Brief, App. B*, at 36a-37a.

IV.

THE DISTRICT AND CIRCUIT COURTS CORRECTLY CONCLUDED THAT NO TAKING OCCURRED BECAUSE THE HAIKS PURCHASED LAND THAT LACKED THE RIGHT TO RECEIVE 400 GALLONS OF CULINARY WATER PER DAY, A PREREQUISITE TO DEVELOPMENT OF THE LAND.

The Haiks brought their taking claim solely against Alta based on an alleged violation of Article I, Section 22 of the Utah Constitution, which provides: "Private property shall not be taken or damaged for public use without just compensation." To succeed on a regulatory taking claim, it is axiomatic that the governmental entity enact some regulation that affects the property — which Alta did not do. More fundamentally, to succeed on such an allegation, a claimant first "must possess a protectable interest in property that is taken or damaged for public use." *Bagford v. Ephraim City*, 904 P.2d 1095, 1097 (Utah 1995). Moreover, as the Tenth Circuit explained, the "mere expectation of municipal water service in the future is not a legal right that constitutes property subject to taking." *Petitioners' Brief, App. A*, at 16a (citing *Bagford, supra*, at 1099). The first issue, therefore, in evaluating the Haiks' taking claim is whether they ever possessed the right to build on their property.

In evaluating this first issue, the district court reached the undisputed conclusion that the Haiks own exactly what they originally purchased in 1994: "lots in the Albion Basin Subdivision #1 with appurtenant water rights limited to 50 gallons per day per unit under the 1963 agreement." *Petitioners' Brief, App. A*, at 15a. As the court further noted, the Haiks lacked the critical right that their predecessor in

interest also lacked: "the legal right to use water in an amount sufficient to satisfy the health department requirement of 400 gallons per day per unit." *Id.* Based on these undisputed facts, the circuit court held: "The Haiks cannot maintain a taking claim because they did not have a protectable interest in property that was taken or damaged by Alta's denial of a building permit." *Id.*

The Haiks' attempt to sidestep the above conclusion by arguing *for the first time* that the "proscribed use" is not a nuisance and, therefore, Alta must compensate them for their preexisting inability to build on their property. *Petitioners' Brief* at 9-11. There are, however, two other problems with this argument: First, it presupposes that the Haiks had a protectable property interest that Alta took from them, thus rendering the property without any economic use. Second, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1002 (1992), is not as narrowly limited as the Haiks suggest. These two points are addressed below.

Ostensibly relying on *Lucas*, *supra*, the Haiks argue that Alta must compensate them for a taking because "[l]egislation that eliminates all economic use must derive from the state's law of private nuisance or its police power authority to protect against emergencies." *Petitioners' Brief* at 9. Importantly, the Haiks have never offered any evidence that there once was an "economic use" which has now been "eliminated" by Alta's adherence to the Salt Lake County Health Code. As the district court concluded, the Haiks now have exactly what they had when they originally purchased the property. *Petitioners' Brief, App. A*, at 15a.

The Haiks' argument is further undermined by the two cases they rely upon in making their "nuisance" argument:

Lucas, supra, and *Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990). In *Lucas*, the landowner, who purchased his property in 1986, had a right to develop his land until the passage of the Beachfront Management Act in 1988. *Lucas*, 505 U.S. at 1006. Similarly, in *Colman, supra*, the lessee operator of an underwater brine canal held a property interest (easement) allowing him to extract minerals from the canal until the enactment of the Great Salt Lake Causeway Act. That Act authorized breaching of a causeway and threatened Colman's ability to further use the canal. *Colman*, 795 P.2d at 623-24. In both cases, unlike the Haiks' case, the affected parties held protected property interests which were subsequently affected by the government's newly enacted legislation. *See also Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed.Cir. 1994) (following *Lucas* and stating that one element of a regulatory taking requires "an interest vested in the owner, as a matter of state property law, *and* not within the power of the state to regulate under the common law nuisance doctrine") (emphasis added).

The Haiks' "nuisance" argument also relies on a strained and extremely narrow reading of *Lucas*. The *Lucas* court discussed the development of the "harmful or noxious uses" principle and its evolution into the modern recognition that government can, without compensation, eliminate all economic use of land if such action derives from the power to prevent public harm. *Lucas*, 505 U.S. at 1021-24. Although the *Lucas* court discussed this ability in terms of police power and prevention of nuisance, the foundation for the court's decision was the recognition that there can be no taking where the property owner had no prior right to a particular use of the property. In the words of this Court:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use,

> we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property.

Lucas, 505 U.S. at 1027 (footnote omitted).

To determine what interests were not part of the owner's title, the *Lucas* court directed us to look at "the restrictions that background principles of the State's law of property *and* nuisance already place upon land ownership." *Id.* at 1029 (emphasis added). The court further explained:

> In light of our traditional resort to "existing rules and understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, . . . this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional.

Id. at 1030 (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-1012 (1984); *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring)); *see also*

Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 694 (8th Cir. 1996) (following *Lucas* and indicating that the "regulatory action [banning billboards] may well have the effect of eliminating the land's only productive use, but it does not proscribe a productive use that was previously permissible."); *Hoeck v. City of Portland*, 57 F.3d 781, 788 (9th Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996) (demolition did not amount to taking since, under zoning law in effect at the time landowner took title, he had no right to use his property to maintain an abandoned structure).

In the present case, the Health Code requirements mandating sufficient culinary water as a prerequisite to development and a building code requiring a sufficient supply of culinary water are examples of such "existing rules and understandings" that legitimately bar the Haiks from putting their land to a proscribed use. As in *Lucas*, such a conclusion is surely unexceptional.

V.

THE DISTRICT AND CIRCUIT COURTS CORRECTLY CONCLUDED THAT THE HAIKS HAD NO TAKING CLAIM BECAUSE THEY PURCHASED THE PROPERTY AFTER THE RESTRICTING REGULATIONS WERE IN PLACE.

The Haiks argue it is irrelevant whether they purchased the property after the health code requirement of sufficient culinary water was in place "[b]ecause Petitioners have *lost* all economically beneficial use of their property. . . ." *Petitioners' Brief* at 11 (emphasis added). As pointed out above, however, the Haiks could not have lost that which they never possessed: "a legal right to use water in an amount

sufficient to satisfy the health department requirement of 400 gallons per day per unit." *Petitioners' Brief, App. A*, at 15a. Therefore, the Haiks are now essentially arguing that whenever undevelopable property is purchased a taking has occurred due to the preexisting regulation which prevents development.

In support of their argument, the Haiks ostensibly rely on several cases, principally one case from this court, *Nolan v. California Coastal Comm'n*, 483 U.S. 825 (1987). There are two problems with the Haiks' reliance on *Nolan*: First, it is an exaction case. Second, unlike the Haiks, when the Nolans purchased the property their bundle of rights included a right that was taken from them by the California Coastal Commission. Each of these arguments are addressed below.

In *Nolan*, the government conditioned the grant of a building permit to the Nolans on their transfer of an easement to the public to increase access to local public beaches. *Nolan*, 483 U.S. at 827-29. As the court eventually held, this exacted from the Nolans their basic right to exclude others from their property, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 831 (citations omitted) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)). In the Haiks' case, Alta has exacted *nothing* from the Haiks. Rather, Alta conditioned the Haiks building permit on the Haiks' ability to show that they possessed the right to receive culinary water sufficient to satisfy health code requirements. Unlike *Nolan*, the Haiks were not asked to give up any right, rather, they were asked to prove the existence of a right. Because neither they nor their predecessors ever held such a right, Alta's denial of their building permit affected no taking of property from the Haiks.

The Haiks also argue that *Nolan* supports their taking claim because the Nolans knew, prior to their purchase of the property, of the Coastal Commission's policy of exacting public easements in exchange for building permits. Thus, the Haiks argue by implication that they suffered a taking even though Alta's requirement of sufficient culinary water was in place prior to their purchase. This argument runs counter to the Haiks' continual representations that they knew of no such requirement prior to their purchase. More fundamentally, however, such an argument is not supported by *Nolan* for two reasons: First, the Nolans purchased their property after the California Superior Court granted their writ of mandamus and struck down the permit condition but before that court was reversed by the California Court of Appeal. *Nolan*, 483 U.S. at 829-30. Therefore, the Nolans purchased the property with a right to build without exaction. Second, the *Nolan* court noted that, although the Nolans' rights were not altered because they purchased the property with knowledge of the Commission's exaction policy, "so long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.* at 833, n.2. However, the Haiks' predecessors in interest also possessed no water rights sufficient to satisfy health code requirements. Therefore, Alta could (and did) deny those predecessors the very request the Haiks now seek. *See Petitioners' Brief, App. B*, at 19a-25a (detailing, in part, the Haiks' predecessor's (Marvin Melville's) denial of a building permit due to his inability to meet the same culinary water requirement). *See also Melville v. Salt Lake County*, 570 P.2d 687, 689 (Utah 1977) (Melville's attempts to develop the same property.).

The Haiks also cite three other cases ostensibly in support of their argument that preexisting restrictions do not defeat a taking claim. However, all of the cases are distinguishable. For example, in *Del Monte Dunes at Montery, Ltd. v. City of Montery*, 95 F.3d 1422 (9th Cir. 1996), *aff'd on other grounds*, __ U.S. __, 119 S. Ct. 1624 (1999), Del Monte purchased the property from Ponderosa Homes while Ponderosa's application for a building permit was pending. *Del Monte Dunes*, 95 F.3d at 1425. Del Monte continued to pursue the permit until it was eventually denied five years later. *Id.* During the pendency of the application process, the City progressively sought more conditions for development until, argued Del Monte, that no part of the property had any economically beneficial use. *Id.* at 1433. Obviously, this is quite different from the Haiks' case, in which the condition of sufficient culinary water existed prior to the Haiks' purchase of land and application for a building permit. Moreover, *Del Monte* involved the discretion of the City to set its own conditions for development. In the present case, Alta had no discretion to circumvent or ignore the county health code.

The Haiks also rely upon another Ninth Circuit case, *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990). They argue that "the district court completely ignored the fact that several of the plaintiffs in that case did not purchase their land until the challenged moratorium that prevented them from getting water had been in place for eight to ten years." *Petitioners' Brief* at 12. In *Lockary*, however, the question was whether a loss of all economically beneficial use was caused by an actual water shortage. *Lockary*, 917 F.2d at 1154. Like *Del Monte, supra*, the question in *Lockary* was whether there had been an uneven use of discretion. In the Haiks' case, Alta exercised no discretion by enforcing the preexisting county health code.

Finally, the Haiks cite a case from the Court of Federal Claims, *Bowles v. United States*, 31 Fed. Cl. 37 (1994), and represent that Bowles knew of the offending government permit requirement prior to his application to build. However, the *Bowles'* court, in reviewing the evidence presented at trial, explained that Bowles reasonably did *not* believe that the preexisting permit requirement applied to his property. *Bowles*, 31 Fed. Cl. at 51. Moreover, the *Bowles'* court relied on *Lucas, supra*, and as explained above, *Lucas* teaches that no taking occurs when the property owner had no prior right to do that which the regulation prohibits.

CONCLUSION

Petitioners' equal protection claims are premised on the novel theory that the Town of Alta should have been willing to breach its Water Supply Agreement with Salt Lake City by extending its water lines beyond its 1976 boundaries so the Petitioners could satisfy culinary water supply regulations that had been in effect in the Albion Basin for more than twenty years. Applying the highly deferential standard of equal protection review, the courts below rejected Petitioners' equal protection claims. There was nothing exceptional in the analysis or the results.

Petitioners' takings claim is also imaginative and equally unsound. They contend that the Town of Alta deprived them of a protected property interest under state law, i.e., the right to a legally sufficient water supply to develop their Albion Basin lots when, in fact, no such interest ever existed. Petitioners purchased lots that were not entitled to the 400 gallons per day of culinary water required under long standing state and local regulations. Applying recent decisions of this Court and the Utah Supreme Court, the courts below correctly concluded that Alta could not take what Petitioners never had.

For the above reasons, the Town of Alta respectfully requests that the Court deny Petitioners' Writ for Certiorari.

Respectfully submitted,

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